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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 939

JUNE KEGLEY, a Widow,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETTTION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ELTON GILLILAND and
JAMES M. O'LEARY of
SHAFER, GILLILAND, DAVIS,
BUNTON & McCOLLUM,
Post Office Drawer 1552,
Odessa, Texas 79760,

W. O. SHAFER,
Post Office Drawer 1552,
Odessa, Texas 79760,
A/C 915, FE 2-0893,
Attorney for Respondent,
Aetna Life Insurance Company.

WARLICK PRESS, INC.—P. O. BOX 10543—2263 VALDINA STREET—DALLAS—ME 1-3130

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Aetna Life Insurance Company, opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. The opinion and decision of the Court of Appeals was correct. The petition should be denied.

STATEMENT

This suit was brought against Aetna Life Insurance Company by petitioner-plaintiff, June Kegley, the surviving widow and beneficiary of Joseph Felix Kegley, deceased,

to recover special accidental death benefits under the provisions of a group insurance policy issued to deceased's employer. Petitioner's husband died after suffering a heart attack, described by medical witnesses as a coronary thrombosis or a coronary occlusion (R. 155, 178, 310, 376). The policy involved expressly limited payment of death benefits to those situations where the insured (1) suffered a bodily injury (2) caused by an accident (3) and as a direct result of such injury and to the exclusion of all other causes sustained death (4) with the injury being evidenced by one or more visible contusions or wounds on the exterior of the body (R. 36, 38, policy introduced in evidence at p. 210).

Although several specifications of error were presented in the court below by respondent (appellant in the court below), the Court of Appeals only determined: first, that the district court's instructions to the jury regarding the cause of death were not in conformity with the law of Texas nor the language of the insurance policy involved; and second, that the district court's instructions with respect to the policy requirement of "visible contusions or wounds on the exterior of the body" were also erroneous and that, as properly defined, there was no evidence to satisfy such requirement. Contrary to petitioner's statements, the Court of Appeals did not attempt to determine the cause of death, did not pass upon the evidence bearing upon whether or not the deceased sustained a bodily injury caused by an accident, and did not deprive the petitioner of a jury trial on any question of fact.

REASONS THE WRIT SHOULD BE DENIED

1. The Court of Appeals properly construed and applied Texas Authorities in deciding this case.

The policy involved, as a condition precedent to recovery, expressly requires that any bodily injury sustained by the deceased-insured be "evidenced by one or more *visible contusions or wounds on the exterior of the body,* except in the case of drowning" (R. 36, policy introduced in evidence at p. 210). The burden was thus cast upon petitioner-plaintiff to produce evidence to satisfy this condition or requirement and, in this, the petitioner totally failed. The *only* evidence introduced upon trial in this connection was that the deceased's lips, or area around the lips, turned blue after the attack (R. 95-97, 105, 134-135, 196-197). No one disputed this testimony. This blue condition was identified by medical witnesses as cyanotic pallor, or cyanosis, a characteristic of all dead persons (R. 196-197, 317-318), particularly where a heart attack is involved (R. 385). The medical witnesses further identified a "contusion" as a "bruise" (R. 201, 322, 383) and a "wound" as a separation, dissolution or disruption of tissue (R. 201, 321, 382-383). It was agreed in the testimony that there were no bruises, contusions or wounds about the body of the deceased (R. 97, 103, 230, 201-202), and that cyanosis is not itself a contusion or wound (R. 197, 317-318).

The only evidence which petitioner can single out is the statement of a Dr. Homan that the purple discoloration of the lips can be outward visible evidence of an internal damage or injury to the heart. But this statement misses com-

pletely the policy condition or requirement of *contusions or wounds on the exterior of the body* and even Dr. Homan admitted there is a distinction between the coloration of cyanosis on one hand and wounds and contusions on the other (R. 381-385). In short, there was absolutely no evidence on the exterior of the deceased's body of any visible "contusion or wound" as those words are commonly understood. There was no evidence for the jury to weigh and no facts to be considered pertaining to this policy condition.

The trial court's instruction to the jury, however, actually removed this condition from the policy by equating the policy requirement of visible contusions or wounds with visible marks and further instructed the jury that blue lips satisfied the policy requirements as a matter of law. Petitioner attempts to do likewise to compensate for the lack of evidence on this point.

Generally speaking, there are two types of clauses of the nature here involved. One type requires a sign or mark of injury on the exterior of the body while the other type, as in the instant policy, requires a visible contusion or wound on the exterior of the body. Under the former type, most any visible abnormality will satisfy the requirement—a pale and sickly look, vomiting and retching, passing of unnatural substances, discloration of the skin, shrinkage of muscles or emaciation. 39 A.L.R. 1011, 45 C.J.S. Insurance, Sec. 755, p. 784; *Royal Casualty v. Nelson*, 153 S.W. 674 (Tex. Civ. App. 1913, no writ hist.).; *Hawkinson v. Order of United Commercial Travelers*, 20 S.W. 2d 101 (Tex. Civ. App. 1929, no writ hist.).

The second type clause, requiring a visible contusion or wound, is much more restrictive. The distinct difference in the clauses and their requirements is made plain in *Travelers Ins. Co. v. Ansley*, 124 S.W. 2d 37 (Ct. App. Tenn. 1938, cert. den., on subsequent appeal 173 S.W. 2d 702). The court there said that under a policy requiring only a visible sign or mark, any sign of the injury such as a pale or sickly look in the face, will satisfy the requirement. In the type clause with which we are concerned, however, the Tennessee court recognized that the limits of the required evidence are narrowed and stated at p. 42:

> "In other words under the one provision any manifestion of the injury which can be properly classified as a sign or mark thereof is sufficient to meet its requirements, whereas, under the other, the parties agree upon the kind of sign or mark, namely a bruise or contusion that must exist on the exterior of the body before liability is incurred."
>
> "In this view every external wound or contusion may be a sign or mark of an internal injury not otherwise apparent to the eye but we think it is clear that every physical sign or mark of such an injury is not necessarily a wound or contusion as the words are commonly understood."

This case seems to declare only what is obvious and comport with common sense.

The weight of authority from other jurisdictions recognizes this difference in the two type clauses and supports the conclusion that here there was no contusion or wound on the exterior of the insured's body. *Paist v. Aetna Life Insurance Co.*, 60 F. 2d 476 (3d Cir. 1932); *Paul Revere Life Ins. Co. v. Stanfield*, 151 F. 2d 776 (10th Cir. 1945, cert.

den'd, 327 U.S. 795); *Massachusetts Mut. Life Ins. Co. v. Pistolesi*, 160 F. 2d 668 (9th Cir. 1947, cert. den'd, 332 U.S. 759) (blue lips from coronary thrombosis); *Stirk v. Mutual Life Ins. Co. of New York*, 199 F. 2d 874 (10th Cir. 1952); *Voelker v. Combined Insurance Co. of America*, 73 S. 2d 403 (Fla. Sup. 1954); *Life & Casualty Ins. Co. of Tennessee v. Brown*, 99 S.E. 2d 98 (Ga. Sup. 1957) (blue tint to skin from brain injury); *Hill v. Woodman of the World Life Ins. Society*, 142 S.E. 2d 869 (S. Car. Sup. 1965) (cyanosis from heart attack).

There is no definitive decision by the Texas Supreme Court with respect to this particular requirement of visible contusions or wounds. However, that court has furnished certain clear indications and guidelines of the course it is likely to follow. From these indications and other available data to be considered by the federal court, *Putman v. Erie City Manufacturing Company*, 338 F. 2d 911 (5th Cir. 1964), note 5, the course is clear that in Texas cyanosis does not satisfy the policy requirement of contusions or wounds.

In *Pan American Life Insurance Co. v. Andrews*, 161 Tex. 391, 340 S.W. 2d 787 (Tex. Sup. 1960), the problem was not squarely raised but the opinion does show the course of the Supreme Court of Texas. In this case there were two policies of insurance involved, both of which, in effect, insured against bodily injuries effected through external, violent and accidental means, of which there is a visible contusion or wound on the body, except in the case of drowning or internal injuries revealed by autopsy. The Texas court, in

discussing the opinion of a Washington court which allowed recovery under an accident policy for a cerebral hemorrhage or stroke produced by fright stated, at p. 791:

> "Certainly the plaintiff in that case would not have recovered if the policy had excluded 'bodily injuries of which there is no visible contusion or wound on the exterior of the body and no internal injuries revealed by autopsy.'"
>
> * * *
>
> "These agents (referring to poison, asphyxiation and drowning), of course, do not leave any visible contusions or other outward marks, but do bring to bear physical force upon the body and may be revealed by autopsy."

and at p. 792:

> "The provision for autopsy is to afford the opportunity for establishing the fact that death was caused by a physical force where there was no outward manifestation on the body of that force. Otherwise, no recovery could be had for an accidental death caused by taking into the body poisonous substances or for other injuries sometimes caused to internal organs of the body or by external physical force without any visible contusion or wound."

This case recognizes that ordinary signs of death are not contusions or wounds and that it is possible to have some injury involving the internal structure of the body without the presence of any contusion or wound on the exterior of the body. Most every injury or illness will leave some sign—perspiration, blue lips, etc. Dr. Ralph Homan, a witness offered by the petitioner, stated that cyanosis or blue lips can come about as a consequence of drowning or of asphyxiation (R. 384). Referring to the court's opinion in *Pan American*

Life Insurance Co., (p. 791, above quoted), it is apparent that the blue lips or cyanosis resulting from asphyxiation or drowning would not satisfy the policy requiements of a visible contusion or wound. In short, blue lips customarily associated with death is not such a visible contusion or wound as can satisfy the condition precedent to recovery in this case.

An earlier Texas case by a Court of Civil Appeals, *American Nat'l Ins. Co. v. Fox*, 184 S.W. 2d 937 (Tex. Civ. App. 1944, error ref'd, w.o.m.), not the Texas Supreme Court, discussed contusions and wounds and marks or signs. Petitioner complains because the court below, after careful search, determined that *Fox* should not be authority in this case and that the Texas Supreme Court would decide differently. In making this determination, the opinion of the court below, written by a Texas judge, properly distinguished and declined to follow *Fox* because (a) of the differences in the evidence in this case and *Fox*, particularly as to the cause of the injury and death; (b) the differences in the wording of the policies involved; and (c) legal authorities indicating that the Texas Supreme Court would not follow *Fox* (p. 14-19 of the court's printed opinion; p. A-12 to A-16 of the opinion attached to the Petition for Writ).

Equally as important as the foregoing reasons for concluding that *Fox* was not authority in this case and that it does not represent the view of the Texas Supreme Court is the well settled Texas law that terms used in a contract of insurance, if not defined in the policy, are to be given their ordinary, usual, common or generally understood meaning.

United States Insurance Co. of Waco v. Boyer, 269 S.W. 2d 340 (Tex. Sup. 1954); *Western Reserve Insurance Co. v. Meadow*, 261 S.W. 2d 554 (Tex. Sup. 1953); *Guardian Life Insurance Co. of America v. Scott*, 405 S.W. 2d 64 (Tex. Sup. 1966); *American Casualty Co. of Reading, Pa. v. Myrick*, 304 F. 2d 179, 183 (5th Cir. 1962). By way of definitions, a contusion is ordinarily understood to be synonymous with bruise or an injury which affects subcutaneous tissue without breaking the skin. Vol. 9A, *Words and Phrases*. A wound is described as an injury where the skin or other membrane is broken. *Life and Casualty Ins. Co. of Tennessee v. Brown, supra;* see also, *Zorn v. Aetna Life Insurance Co.*, 260 F. Supp. 730, at 733 (E.D. Tex. 1965). The testimony of all of the medical witnesses closely conformed to these usually accepted definitions (R. 201, 321-322, 382-383). "Wounds and contusions" then, as commonly and ordinarily understood, do not include cyanosis.

From the available authorities, the conclusion is inescapable that *Fox* has no application to this case and that the Texas Supreme Court would not follow *Fox* but would hold that a requirement of "visible contusions or wounds" could be satisfied only by a bruise or by an injury in which the skin or membrane is broken—not a mere mark or sign of death, such as cyanosis. Having thus properly construed the words used in the policy, the court below examined the evidence and found absolutely none to satisfy this requirement. It was proper to direct entry of judgment for respondent. The *Erie* doctrine was not ignored or violated but

was expressly recognized and followed by the court below (see p. 14 of the court's printed opinion and p. A-12 of the opinion attached to the Petition for Writ).

2. The Court of Appeals did not violate Petitioner's rights under the Seventh Amendment to the Constitution of the United States.

In directing the district court to enter judgment for the respondent, the Court of Appeals did not deprive petitioner of a trial by jury in violation of the Seventh Amendment. The Constitution does not create evidence where there is none. In this case, there simply was no evidence of a contusion or wound on the exterior of the body. The jury had nothing to pass on.

In every jury case, there is a preliminary question for the judge whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the burden of proof rests. *Gunning v. Cooley*, 281 U.S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720 (1930). The power of the courts to pass upon this question of law is just as much a part of the process of trial by jury at common law guaranteed by the Seventh Amendment as is the power of the jury to pass upon controverted issues of fact. *Diederich v. American News Co.*, 128 F. 2d 144 (10th Cir. 1942).

The Court of Appeals for the Fifth Circuit stated in *Buffalo Insurance Company v. Spach*, 277 F. 2d 529 (5th Cir. 1960), at p. 531:

> "We are aware of the provisions of the Seventh Amendment and of the Federal Rules of Civil Procedure,

> rule 38(a), 28 U.S.C.A., which require the submission to juries of questions of fact in dispute, or questions of conflicting inferences from undisputed facts. However, in the absence of probative facts, supporting by reason, the conclusion expressed in the verdict, the question is one for the court rather than the jury. Myer v. Reading Co., 331 U.S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615; Beuter v. Eastern Air Lines, 5 Cir., 1955, 226 F. 2d 443."

The power of the federal courts to direct a verdict for insufficiency of evidence has long been recognized. *Galloway v. United States*, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943). The Court of Appeals here correctly exercised that power regardless of whether the sufficiency of the evidence be tested by a federal standard or a state standard. As stated in *Galloway, supra*, at 319 U.S., p. 395:

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

See also, *American Casualty Co. of Reading, Pa. v. Myrick, supra*, at 182-183.

Cyanosis was the only evidence approximating a contusion or wound. Since cyanosis is not "visible contusions or wounds on the exterior of the body", there was no evidence to meet the express requirements of the policy and there was no error in directing entry of judgment for respondent.

3. There is no special or important reason for reviewing this case.

It is overly dramatic to claim, as does petitioner, that the decision in this case will affect millions of policyholders whose bread winners might suffer death. There certainly is no evidence in the record supporting this statement in any manner. The opinion of the Court of Appeals simply confirms the integrity of commonly used and understood words of the English language.

4. The opinion of the Court below is not in conflict with applicable legal authorities.

It is difficult to determine the exact errors urged in petitioner's fourth Reason For Granting Writ. At pages 22-24 of the petition, it is apparently claimed that the Court of Appeals held the deceased did not sustain a bodily injury caused by accident. At pages 30-35 and 38-39, petitioner seems to contend the Court of Appeals held there was no fact issue as to the cause of death, i.e., disease or bodily injury caused by accident. This is erroneous. The Court of Appeals made neither such holding urged by petitioner.

The Court of Appeals did hold that the instructions given by the district court with respect to the cause of death were erroneous. The opinion points out that the policy, fairly construed, limits recovery to those situations where death results *solely* from bodily injury caused by an accident to the exclusion of all other causes such as pre-existing disease, while the instruction of the district court permitted recovery where death resulted from a number of concurring or contributing causes, including pre-existing disease. In

short, it was held that the instructions permitted recovery in situations not covered by the policy and that the instructions misplaced the burden of proving the cause of death. The Court of Appeals did not attempt to weigh or determine the sufficiency of the evidence with respect to cause of death, but *expressly* reserved this issue for consideration by the jury under proper instruction. See pages 10-12 of the court's printed opinion and pp. A-9 and A-10 of the opinion attached to the Petition for Writ. The Court of Appeals did not even write on the question of whether or not the deceased sustained a bodily injury caused by an accident. It was unnecessary to do so on the basis on which the case was decided. The interjection of these claims by petitioner serves only to confuse the matters presented to this court. The turning point in the opinion of the Court of Appeals is the holding that cyanosis is not a wound or contusion.

CONCLUSION

The Court of Appeals properly disposed of this case.

1. The opinion of the Court of Appeals is not in conflict with applicable Texas authorities.

2. Since there was a total lack of evidence that any bodily injury sustained by the insured was evidenced by a contusion or wound on the exterior of the body, the death of the insured did not come within the terms of the policy and the Court of Appeals properly directed entry of judgment for respondent.

3. The action by the Court of Appeals did not deny petitioner a trial by jury of any issue of fact raised by the

evidence nor violate petitioner's rights under the Seventh Amendment to the United States Constitution.

4. The matters presented for review are neither special nor important except in this case.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ELTON GILLILAND and
JAMES M. O'LEARY of
SHAFER, GILLILAND, DAVIS,
BUNTON & MCCOLLUM,
Post Office Drawer 1552,
Odessa, Texas 79760,

W. O. SHAFER,
Post Office Drawer 1552,
Odessa, Texas 79760,
A/C 915, FE 2-0893,
Attorney for Respondent,
Aetna Life Insurance Company.

W. O. Shafer

W. O. Shafer

CERTIFICATE OF SERVICE

Copies of the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been delivered to counsel for Petitioner by posting same in the United States mail, postage prepaid, addressed on this the 16 day of January, 1968.

W. O. Shafer

W. O. Shafer